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VIA ELECTRONIC FILING (ECFS)

Marlene H. Dortch, Esq., Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: **WRITTEN EX PARTE PRESENTATION**
Telecommunications Relay Services and Speech-to-Speech Services for Individuals
with Hearing and Speech Disabilities
CG Docket No. 03-123

Dear Ms. Dortch:

The following information is submitted on behalf of Hamilton Relay, Inc. ("Hamilton"), in response to Sorenson's January 6, 2006 *ex parte* submission in this proceeding,¹ and in furtherance of the Commission's understanding of the magnitude of the Video Relay Service ("VRS") call blocking problem.

Sorenson Is Dominant

As an initial matter, Sorenson claims that it is not dominant because it serves "less than 8 percent of all ASL users."² However, the relevant market is not "all ASL users," or the "potential" number of VRS users, but the actual number of VRS minutes of use submitted to the Interstate TRS Fund Administrator. As of November 2005, there were slightly more than 2.9 million VRS minutes of use reported to the Administrator.³ Sorenson is on record as indicating that it reports over half of the VRS minutes reported to the Fund Administrator per month.⁴

¹ Letter from Gil N. Strobel, Counsel for Sorenson Communications, Inc., to Marlene H. Dortch, FCC Secretary (Jan. 6, 2006) ("Sorenson Jan. 6 *ex parte*").

² *Id.* at 23.

³ See <http://www.neca.org/media/0106TRSSStatus.pdf>.

⁴ As stated in Hamilton's December 23, 2005 *ex parte* letter, Sorenson informed the Commission on November 15, 2004 that "Sorenson . . . currently provides interpretation for over half of the minutes submitted to the VRS Fund." See Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, FCC Secretary, at 4 (Dec. 23, 2005) (quoting Opposition of Sorenson Media, Inc., CG Docket No. 03-123, at 1 (filed Nov. 15, 2004)).
(continued)...

Thus, Sorenson is the dominant provider in the sense that it reports far more minutes to the Administrator than any of the other seven VRS providers, and appears to be exercising its dominant position to prevent users from accessing the content of their choice.

In short, as the dominant provider, Sorenson's arbitrary call blocking mechanisms determine who can participate and who is excluded. This is a patently unfair practice under any assessment of competition policy.⁵

Sorenson's Call Blocking Practices Deny the Functional Equivalence Mandated by the Americans with Disabilities Act

Sorenson attempts at length to compare the VRS industry to other situations in which the Commission has not acted to prohibit closed networks.⁶ Hamilton agrees with the comments of others in this proceeding who note that all of the other situations cited by Sorenson are scenarios in which the customer pays.⁷ In relay, there is no direct billing relationship between providers and users. Rather, there is a mandatory federal fund established under the Americans with Disabilities Act, from which providers may receive reimbursements for providing certain relay services free of charge, in order to carry out the "functional equivalence" mandate of the ADA. As such, Sorenson's efforts to close the network of VRS users is inconsistent with the way in which other relay services function. In traditional relay and all other relay services, any user can call any provider from any state and make an interstate call. **Since the Commission has determined (at least on an interim basis) that all VRS calls are interstate in nature, VRS users should be free to call any provider if the service is to be functionally equivalent to traditional relay.**

Research and Development Issues

Hamilton has previously indicated its support for the inclusion of certain research and development ("R&D") costs in the VRS rate base.⁸ The inclusion of such costs will ensure that VRS providers continue to receive a return on investment in new VRS technology. At the same

Sorenson does not publicly report its actual VRS minutes of use, but this information is readily available to the Commission from the Fund Administrator.

⁵ See, e.g., Eleanor M. Fox & Lawrence A. Sullivan, *Cases and Materials on Antitrust*, at 145 (West Pub. 1989). A complete assessment of Sorenson's dominance of the relevant market is beyond the scope of this proceeding, and frankly would be unnecessary if the Commission grants the relief sought in the California Coalition's petition. See *Petition for Declaratory Ruling on Interoperability of the California Coalition of Agencies Serving the Deaf and Hard of Hearing* (Feb. 15, 2005).

⁶ Sorenson *ex parte* at 20-25.

⁷ See, e.g., Letter from Karen Peltz Strauss, Counsel for Communications Service for the Deaf, Inc., to Marlene H. Dortch, FCC Secretary (Jan. 25, 2006) ("CSD Jan. 25 *ex parte*").

⁸ See Letter from David A. O'Connor, Counsel for Hamilton, Relay, Inc., to Marlene H. Dortch, FCC Secretary, at 3-4 (Dec. 2, 2005) ("Hamilton Dec. 2 *ex parte*").

time, however, Hamilton recognizes that there are limits to the R&D costs that can be recovered through the interstate TRS Fund.

For the record, Hamilton believes it is important to note the distinction between R&D costs for equipment, such as the D-Link or VP-100, and R&D costs for services. Hamilton is unaware of any occasion on which the Commission has authorized recovery of R&D costs for equipment from the interstate TRS Fund. For example, when the Fund was originally created in response to the ADA, the Commission did not authorize reimbursement for TTY equipment from the Fund. Nor should the Commission authorize reimbursement for the VP-100 or any successors thereto, or any other hardware related to the provision of VRS.

There are R&D costs directly related to VRS *services*, however, which Hamilton believes improve the quality of VRS service and legitimately should be compensated from the Fund. The Commission recognized this when it decided to include “costs that relate[] to engineering support.”⁹ As the expert agency, the Commission has been authorized by Congress to compensate relay providers for their reasonable costs of providing relay services. The Commission’s rules provide broad authority for the Commission to determine which provider costs are allowed and which provider costs are disallowed. Specifically, Section 64.604(c)(5)(iii)(E) states:

“TRS Fund payments shall be distributed to TRS providers *based on formulas approved or modified by the Commission.*” 47 C.F.R. § 64.604(c)(5)(iii)(E).

Thus, the Commission already has the authority to modify the payment formula to include certain R&D costs without the need for a formal rule change. Hamilton therefore requests that as part of any decision to prohibit call blocking, the Commission should clarify which R&D costs may be submitted by VRS providers. The formula approved by the Commission gives it the flexibility to approve or reject any cost information submitted by VRS providers.

Emergency Call Handling

Sorenson makes much of its efforts to improve emergency call handling, in an attempt to justify its call blocking practices.¹⁰ However, Sorenson is not alone in seeking methods for improving VRS for 911, and is not the only provider to have solutions that would render the VRS E911 waiver unnecessary. The issue is an important one for the entire VRS industry, and indeed the Commission has issued a *Notice of Proposed Rulemaking* (“NPRM”) to address the issue. Hamilton intends to respond in detail to the issues raised in the NPRM and will not do so here. In the meantime, however, it is beyond the scope of this proceeding, which is limited to whether the Commission should grant the California Coalition’s petition to prohibit call

⁹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking*, CC Docket Nos. 90-571, 98-67, CG Docket No. 03-123, 19 FCC Rcd 12475, ¶ 192 (2004) (“2004 TRS Order”).

¹⁰ See Sorenson *ex parte*, at 17-20.

blocking. Certainly the Commission should not deem Sorenson's E911 efforts as a justification for the continued blocking of VRS calls against a user's choice.

In connection with the E911 issue, Hamilton is working with CSD, the North American Numbering Council and others to develop a recommended numbering standard for VRS. A uniform numbering plan for VRS will go a long way toward resolving the current E911 problems, and may obviate the need for the E911 waiver. Hamilton looks forward to working with the industry and consumers to resolve this issue as soon as possible. However, Hamilton disagrees with Sorenson's assertion that "technological reasons" prevent the use of "phone numbers" for calls between Sorenson and non-Sorenson users.¹¹ The technology is readily available if Sorenson is willing to integrate its numbering information with the numbering information of other providers, much as the telecommunications industry did with the creation of the North American Numbering Plan Administration.

The Commission Is Not Being Asked to Require Sorenson to "Unbundle" Its Network

Throughout its January 6 *ex parte*, Sorenson suggests that the prohibition of call blocking is somehow the equivalent of requiring Sorenson to "unbundle" its network.¹² Sorenson appears to confuse the "unbundling" requirements of Section 251 of the Communications Act, as amended, with the California Coalition's petition simple request for interoperability, or network neutrality. Section 251 requires incumbent local exchanged carriers to provide "non-discriminatory access to network elements on an unbundled basis at any technically feasible point"¹³ That provision does not apply to Sorenson because it is not an ILEC, nor does it have "network elements" which other providers seek to utilize. Rather, Sorenson has established artificial barriers to customer choice, and is being asked to remove those barriers. There is simply no sound analogy between the unbundling obligations of ILECs and the request before the Commission in this proceeding.¹⁴

In addition, Sorenson argues that the "unbundling" of its network will mean the loss of its control over the quality of VRS interpreters, equipment, answer speed and E911 handling. This argument is meritless. While the E911 issue is important, it is being addressed by the Commission in the *NPRM*; the standards ultimately adopted in that proceeding will apply not only to Sorenson but to all VRS providers. Other VRS providers must abide by the same mandatory minimum standards to which Sorenson is held, including answer speed requirements. If other providers' VRS interpreters or equipment perform poorly, users will respond by seeking quality interpreters and quality equipment elsewhere. Inasmuch as Sorenson believes that its interpreters and answer speed capabilities are superior to the rest of the VRS providers, Sorenson should welcome the competitive opportunity to attract VRS users.

¹¹ *Id.* at 33.

¹² *See id.* at 8, 16, 18, 29 n. 93, 42.

¹³ 47 U.S.C. § 251(c)(3).

¹⁴ Because Sorenson's unbundling argument is irrelevant with respect to VRS, it is also irrelevant with respect to captioned telephone and Internet relay services. *See Sorenson Jan. 6 ex parte*, at 30 n.95.

Sorenson's Practice Violates the Commission's "Network Neutrality" Policy

Hamilton has argued previously that Sorenson's call blocking practice violates the Commission's network neutrality policy.¹⁵ Pursuant to that policy, the Commission must "ensure that IP-enabled services are operated in a neutral manner" and that broadband networks are "open" and "accessible" to "all consumers."¹⁶

Sorenson attempts to argue that it is in compliance with this policy by stating that "Sorenson's customers are free to use their broadband service to access any non-Sorenson Internet-based service or application they choose, including those offered by competing VRS providers."¹⁷ This is simply false. Sorenson's users¹⁸ cannot use a VP-100 to contact the VRS provider of their choice. Thus, the "IP-enabled services" provided by other VRS providers are not "accessible" to users of Sorenson's IP-enabled products.

Revenue-Sharing Arrangements Have No Place in a Federally-Administered Relay Fund

Finally, Sorenson has proposed on several occasions that the Commission force VRS providers to enter into arrangements whereby the providers share revenue from the Fund based on traffic volumes.¹⁹ Specifically, Sorenson's proposal would "provide for a division of revenues for calls in which the VRS company providing the interpreter was not the same as the VRS company that installed the equipment."²⁰

Hamilton strongly disagrees with this proposal. As a procedural matter, the proposal goes far beyond the scope of this proceeding and would appear to require a rule making proceeding. Substantively, such a revenue-sharing plan is at odds with the purpose of the statute mandating relay. As the Commission has noted, Title IV of the ADA established relay as an accommodation for deaf and hard of hearing users,²¹ not as an accommodation to VRS providers.

Moreover, a revenue-sharing scheme is fraught with the potential for fraud and abuse, and the Commission would be at risk of having to serve as an arbitrator of VRS revenue disputes among providers. Finally, it appears that Sorenson is suggesting it would be free to re-direct a

¹⁵ Hamilton Dec. 2 *ex parte*, at 2.

¹⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 01-377, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, *Policy Statement*, at 2 (rel. Sept. 23, 2005).

¹⁷ Sorenson Jan. 6 *ex parte*, at 38 n.140.

¹⁸ As noted above, neither Sorenson nor any other relay provider has "customers," only users who are provided a service as an accommodation under the ADA.

¹⁹ *See, e.g.*, Letter from Ruth Milkman, Counsel for Sorenson Communications, Inc., to Marlene H. Dortch, FCC Secretary, at 1 (Jan. 24, 2006).

²⁰ Letter from Ruth Milkman, Counsel for Sorenson Communications, Inc., to Marlene H. Dortch, FCC Secretary, at 2 (Jan. 19, 2006).

²¹ *2004 TRS Order*, ¶ 179.

VRS call to another provider if, for example, doing so would assist in meeting Sorenson's mandatory minimum answer speeds. Hamilton views such a suggestion as possibly illegal, because it would be contrary to the intent of the VRS user who placed the call. In sum, there are other ways of recouping costs related to VRS equipment without creating a complicated revenue-sharing scheme.

This filing is made in accordance with Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1). In the event that there are any questions concerning this matter, please contact the undersigned.

Respectfully submitted,
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